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IN THE COURT OF APPEALS OF INDIANA

EDWARD J. NIKSICH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0603-PC-171
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Judge
Cause No. 45G04-0409-PC-17

May 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Edward J. Niksich appeals the denial of his petition for post-conviction relief ("PCR"). On appeal, Niksich raises ten issues. However, we find three issues dispositive: 1) whether Niksich waived his claims of error at his trial by failing to raise them on direct appeal; 2) whether the post-conviction court properly denied Niksich relief based on his claim of ineffective assistance of trial counsel; and 3) whether the post-conviction court properly denied Niksich relief based on his claim of ineffective assistance of appellate counsel. Concluding that Niksich has waived his freestanding claims of trial error, and that he did not receive ineffective assistance of trial or appellate counsel, we affirm.

Facts and Procedural History

The underlying facts appear in Roche v. State, the case relating to Niksich's co-defendant at trial.

> Sometime before February of 1990, Niksich used Patricia Andrasco's car to give Ernest Graves, who also was known as "Pee Wee," a ride. The next day, Andrasco, who lived with Niksich, noticed that $120 worth of food stamps was missing from her car.
>
> The State introduced in evidence the deposition of Nanetta Blaski, a baby-sitter for Niksich and Andrasco, in which she stated that sometime in April of 1990, [Roche] and Niksich arrived at Andrasco's residence, and there was a discussion about two people, Ernest Graves and Daniel Brown, also known as "Danny Boy," who were going to be killed or who had been killed. Niksich stated that he wanted to put Graves and Brown in the trunk of Andrasco's car.
>
> Delores Duszynski, who lived with [Roche], testified that on the evening of May 10, 1990, Roche, Roche, Sr., and Niksich left the house driving her car. When Roche arrived home, he entered through the basement, told Duszynski to stay where she was, and told her that there were some guys in the basement he was going to shoot because they owed someone $120.
>
> Duszynski testified that after approximately five minutes [Roche] went downstairs and Duszynski heard about nine or ten gunshots. She heard

someone plead for his life, and then she heard two or three more gunshots. [Roche], Roche, Sr., and Niksich then came upstairs and told Duszynski that the victims possessed only $19 and a dime bag of cocaine.

After [Roche], Duszynski, and Niksich each consumed some of the cocaine, [Roche] asked permission to use Duszynski's car to transport the bodies. The three men went downstairs, and after approximately fifteen or twenty minutes Duszynski heard the car leave.

On the evening of May 10, 1990, Jose Sanchez saw [Roche], Roche, Sr., and Niksich in a car. [Roche] was driving the car, and the men offered Sanchez a ride. Upon arriving at Sanchez' house, [Roche] opened the trunk of the car. When Sanchez saw the bodies, Niksich told Sanchez that he had shot one of the men while they were in the basement of [Roche's] house. Niksich stated that he had told one of the victims that he was going to die and that he was with the wrong guy at the wrong time and the wrong place. [Roche] stated that he had shot the other victim while the victim begged for his life. [Roche] told Sanchez that he had used both a .38 caliber derringer and a .22 caliber rifle. At one point, he went upstairs to get the rifle, and upon returning, repeatedly shot the victim in the head.

James Superits testified that [Roche] sold him a two-shot derringer on May 13, 1990. Later that same day [Roche] showed Superits a clipping from a newspaper, claimed that he did it, and described the killings. Three days later Superits gave the gun to the police.

On May 14, 1990, Andrasco gave a statement to the police. She told the officers that on the evening of May 10, 1990, Niksich left the house and then returned later in the night. Niksich told Andrasco that he finally had gotten even with Pee Wee for stealing the food stamps.

On June 10, 1990, [Roche] described to Virginia Ratazczak, a correctional officer for the Lake County Sheriff's Department, how the two victims had been murdered. [Roche] told Ratazczak that while he and Niksich were at the Spot Bar in Calumet City, Niksich pointed out the two victims and stated that one of them owed him $120.

[Roche] and Niksich then set up a phony drug deal with the two victims, took them to the basement of [Roche's] home, where [Roche] then went upstairs to get a gun.

Nine bullets were recovered from the victims' bodies. The State introduced in evidence State's Exhibit 26, a two-shot .38 caliber Excam Derringer. Tests on the bullets showed that four of the bullets were fired from the lower barrel of State's Exhibit 26; therefore, the derringer had to be reloaded at least three times during the perpetration of the crimes.

[Roche] testified that he shot both victims, but claimed that he did so in self-defense. He testified that he owned the .38 caliber derringer, and admitted that he told two deputy wardens that he volunteered to kill the victim who

owed Niksich money.

596 N.E.2d 896, 897-98 (Ind. 1992).

Before his trial, Niksich moved three times for a severance from Roche. The trial court denied all three motions. Niksich also filed a motion to suppress evidence obtained pursuant to a search warrant. The trial court granted this motion. A jury found both Niksich and Roche guilty of two counts of murder and two counts of murder in the perpetration of robbery. It returned a recommendation not to impose the death penalty for Niksich, but to impose the death penalty for Roche. The trial court sentenced Niksich to forty years on both counts of murder, to be served consecutively, and vacated both convictions for murder in the preparation of robbery.

Niksich filed a direct appeal, raising the issues of insufficient evidence and propriety of his sentence. We affirmed Niksich's convictions and sentence in a memorandum opinion. See Niksich v. State, No. 45A04-9103-CR-93, slip op. (Ind. Ct. App. January 28, 1992). Niksich then filed a petition for post-conviction relief on December 15, 1995, and the State responded to this petition on February 27, 1996. Niksich withdrew his petition on November 26, 1997, and filed his amended petition on September 29, 2004. In his petition, Niksich raised fourteen claims. The post-conviction court held a hearing on August 29, 2005, and issued its Order denying Niksich's petition, along with findings of fact and conclusions of law, on February 23, 2006. Niksich now appeals the denial of his PCR petition.

Discussion and Decision

Post-conviction proceedings are civil in nature. Stevens v. State, 770 N.E.2d 739, 745

(Ind. 2002), cert. denied, 540 U.S. 830 (2003). Therefore, to prevail, petitioners must establish their claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Stevens, 770 N.E.2d at 745. On appeal from a denial of a petition for PCR, petitioners must convince this court that the evidence, taken as a whole, leads unmistakably to a conclusion opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745.

I. Laches

Initially, we note that the post-conviction court found that the State had met its burden in establishing the affirmative defense of laches. Laches is an equitable doctrine that "operates to bar consideration of the merits of a claim or right of one who has neglected for an unreasonable time, under circumstances permitting due diligence, to do what in law should have been done." Mansfield v. State, 850 N.E.2d 921, 924 (Ind. Ct. App. 2006), trans. denied. The trial court based its conclusion regarding laches in part on its finding that Niksich failed to file any motions attempting to obtain the record of the proceedings between 1996 and 2001. This finding was supported by a Docket Inquiry, which shows no action by Niksich between July 29, 1996, and April 16, 2001. Exhibit 4; Appellant's App. at 838. However, the chronological case summary indicates that Niksich did indeed file several motions, including three motions for trial transcripts, between July 29, 1996, and April 16, 2001.[1] Because we affirm the post-conviction court's denial of Niksich's petition on other grounds, we do not need to reach its decision regarding laches, and decline to address this

[1] Apparently, the difficulties Niksich encountered in obtaining the record of proceedings stemmed from the fact that the record was needed for Roche's appeal and habeas corpus petition, which, as Roche was given the death penalty, had priority over Niksich's appeal.

apparent conflict in the evidence.

II. Errors at Trial

Niksich raises six issues related to purported errors that occurred at trial. Specifically Niksich argues that he:

1) "was denied his constitutional right against unreasonable searches and seizure guaranteed by the Fourth Amendment of the United States Constitution and Article 1, Section 12 and 13 of the Indiana Constitution when the State introduced illegally obtained evidence into the Appellant's trial";
2) "was denied an adversarial testing of the State's case in chief when the trial court abused its discretion in denying a properly [sic] and timely motion for severance";
3) "was denied his constitutional right to a fair trial, due process and due course of law due to Prosecutor misconduct";
4) "was denied his constitutional right to a fair trial when the trial court read final instruction number 4 [relating to voluntary manslaughter]";
5) was improperly denied statutory good-time credit;
6) was denied "his Fifth, Sixth, and Fourteenth Amendment rights when [the trial court] failed to instruct the jury of every essential element the State was required to prove to convict the Appellant."

Appellant's Brief at 1-2.

"The scope of the relief provided for in [post-conviction] procedures is limited to 'issues that were not known at the time of the original trial or that were not available on

direct appeal.'" Allen v. State, 749 N.E.2d 1158, 1163 (Ind. 2001), cert. denied, 535 U.S. 1061 (2002) (quoting Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000), cert. denied, 534 U.S. 1164 (2002)). "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal." Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). Even if an appellant claims that an error at trial amounts to fundamental error, it is improper for an appellate court to review the claim. Id. ("It was wrong to review the fundamental error claim in a post-conviction proceeding . . . [because] the fundamental error exception to the contemporaneous objection rule applies to direct appeals."). All of the claims raised above were available on direct appeal, and therefore, Niksich's failure to raise them on direct appeal results in waiver.

III. Ineffective Assistance of Counsel

A. Standard of Review

When a petitioner claims to have received ineffective assistance of counsel, the petition must establish the two components of the test set out in Strickland v. Washington, 466 U.S. 668 (1984). Reed v. State, 857 N.E.2d 19, 22-23 (Ind. Ct. App. 2006). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating "that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious they resulted in a denial of the Sixth Amendment right to counsel." Id. Under this prong, we will assume that counsel performed adequately, and will defer to counsel's strategic and tactical decisions. Smith v. State, 765

N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Douglas v. State, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003), trans. denied. Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. A petitioner may show prejudice by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Reed, 857 N.E.2d at 23 (quoting Strickland, 466 U.S. at 694). We will find a reasonable probability exists if our confidence in the outcome is undermined. Id. If we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel's performance. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002). The same standard of review applies to claims of ineffective assistance of trial counsel and claims of ineffective assistance of appellate counsel. Burnside v. State, 858 N.E.2d 232, 238 (Ind. Ct. App. 2006).

B. Ineffective Assistance of Trial Counsel

Niksich argues that his trial counsel was ineffective for several reasons. We will address each in turn.

1. Admission of Evidence

First, Niksich argues that his trial counsel was ineffective for his failure to object to the admission of several exhibits. In order to demonstrate that counsel was ineffective for failing to object to the admission of this evidence, Niksich must show that the trial court would have had to sustain such an objection. Schaefer v. State, 750 N.E.2d 787, 792 (Ind. Ct. App. 2001).

Niksich first argues that counsel was ineffective for his failure to object to the admission of exhibit 23, a newspaper clipping related to the murders. Niksich claims that this clipping was part of the evidence that the court ordered suppressed at the pre-trial suppression hearing. However, the post-conviction court found that this clipping was not recovered during the execution of the search warrant that was determined to be defective. See Appellant's App. at 835. Instead, the post-conviction court found that the clipping was recovered from Roche's home, in which Niksich would have no expectation of privacy. See, e.g., Matson v. State, 844 N.E.2d 566, 571 (Ind. Ct. App. 2006), trans. denied, cert. denied, 127 S.Ct. 514 (2006) (defendant had no expectation of privacy in another's home where defendant was not overnight guest). Niksich has presented no evidence that this clipping was not in fact found in Roche's home, or that it was seized illegally from a place in which Niksich had an expectation of privacy. Therefore, he has failed to establish that the trial court would have been required to sustain counsel's objection.

Niksich next argues that his counsel was ineffective for failing to object to the admission of exhibits 16, 17, 18 (a-k), 19, 22, 23, and 37, which consist of evidence recovered from an automobile that was on his property. Niksich did not own this automobile. Niksich claims that this evidence was also seized pursuant to the defective search warrant and was suppressed at the pre-trial hearing. The post-conviction court found that this evidence was not seized pursuant to the defective search warrant based on the fact that the return copy of the warrant does not list the car as being recovered during the execution of the warrant. Niksich argues that the vehicle was indeed seized pursuant to the warrant, and that

the failure of the return warrant to list the vehicle is the product of careless police work. Niksich points to an arrest report indicating that a vehicle was towed to the Lake County Police Department crime lab at the time of his arrest, which occurred the same day the warrant was served. Although this report may suggest that the vehicle was seized pursuant to the search warrant, it is not our province to judge conflicts in the evidence on appeal. It was Niksich's burden to demonstrate to the post-conviction court by a preponderance of the evidence that his counsel was ineffective for his failure to object to the admission of evidence that the trial court had already suppressed. The post-conviction court found that Niksich had not met this burden, and substantiated its finding with evidence indicating that the car was not seized pursuant to the warrant. Although the evidence is in conflict, we cannot say it unmistakably leads to a conclusion opposite that of the post-conviction court.

2. Statements Made by Prosecutor

Niksich next argues that counsel was ineffective due to his failure to object to the following statement made during the State's closing argument:

> The Judge is going to give instructions about murder and murder in perpetration of a robbery. And ask you to pay very close attention to them and treat those crimes separately even though we have the two victims because they are separate crimes. Felony murder does not require intent. All it requires is the killing in perpetration of a robbery. A robbery took place, it's clear.

Appellant's App. at 589. Niksich argues that this statement erroneously informs the jury that murder in perpetration of a robbery has no mens rea element. However, regardless of the propriety of the prosecutor's statement, Niksich cannot demonstrate prejudice as his convictions for murder in perpetration of a robbery were vacated. That is, even if this

statement by the prosecutor did influence the jury to improperly find Niksich guilty of murder in perpetration of robbery,[2] this statement could have had no effect on the jury's determination that Niksich was guilty of murder.[3]

Next, Niksich argues that counsel was ineffective for his failure to object to the prosecutor's comments regarding defense witnesses' credibility. Specifically, Niksich points to the following passage:

> Don't be fooled. Mr. Jarrett tries to talk about the defense put on [by] Puentez and he talks about the state can do this or the state can do that, why the state didn't put him on. I'll tell you why we didn't put them on. We didn't believe them. That's why we didn't put them on. You saw them up there. Manuel, his testimony was he blacks out, he probably might have even touched them but he doesn't know. I'm not going [to] put a witness like that in front of you. This next fellah, Jamie, he called Sanchez a bum. I don't know what his standard is but just look at how Jamie was, look at his misdemeanor [sic]. Jamie, he couldn't remember anything. The third fellah said he didn't drink on one breath and the next breath he's talking about drinking beer. He says he takes care of his uncles. He also tells you he's not holding a job. What else do we know about him? We know about him, he says they come over, he doesn't pay attention, he says they come over a lot, every other day, very vague. Those three witnesses, their testimony was useless, didn't show anything.

Appellant's App. at 592. Niksich argues that counsel was ineffective for failing to object to these statements because "it is improper for a Prosecutor to express a personal opinion in the

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[2] We note that the post-conviction court found that the trial court gave a proper instruction on the elements of murder in perpetration of a robbery.

[3] As Niksich notes, when alternative grounds are given to the jury on which it may convict a defendant, the unconstitutionality of one of these grounds will require reversal. See Bachellar v. Maryland, 397 U.S. 564, 570 (1970). However, Bachellar referred to a situation where alternative theories for a single offense were submitted to the jury, and one of these theories was unconstitutional. Because on review, the Court could not be sure under what theory the jury found the defendant guilty, the Court was forced to reverse. Id. Here, although the State presented two theories of guilt, these theories related to separate offenses. Niksich makes no argument regarding the prosecutor's comments or trial court's instructions regarding murder, the crime for which the trial court entered judgments of conviction.

truthfulness or untruthfulness of a witness." Appellant's Br. at 33 (citing Craig v. State, 267 Ind. 359, 370 N.E.2d 880 (1977) and Schlomer v. State, 580 N.E.2d 950 (Ind. 1991)). We agree with Niksich that "[i]t is improper for the prosecutor to make an argument which takes the form of personally vouching for the witness." Schlomer, 580 N.E.2d at 957. However, "[p]rosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." Cooper v. State, 854 N.E.2d 831, 836 (Ind. 2006). Also, "a prosecutor may comment on the credibility of the witnesses as long as the assertions are based on reasons which arise from the evidence." Id. (quoting Lopez v. State, 527 N.E.2d 1119, 1127 (Ind. 1988)).

Here, the prosecutor's comments both respond to the defense's comments and are based upon the evidence. The prosecutor explained why he did not call witnesses apparently in response to some comment by the defense as to why the State did not call them.[4] Further, the prosecutor explained why the witnesses' testimony was not credible, and cited specific inconsistencies in their testimony. Thus, his comments on witness credibility were based on evidence before the jury, and not some form of improper personal knowledge. Not only would the trial court have acted well within its discretion in denying an objection made by Niksich's trial counsel, but also, as a tactical matter, "counsel could well have decided to let these brief references pass." Monegan v. State, 721 N.E.2d 243, 254 (Ind. 1999)). In response to Niksich's question as to why he didn't object to the prosecutor's comments on witness credibility, counsel testified at the post-conviction hearing, "I didn't see any need to

object to it because . . . once again, state's argument or counsel's argument is not evidence," and "if it was stated that way and I didn't object, then for strategic reasons I chose not to object to it." Transcript at 21-22.[5] Niksich has not demonstrated that counsel was ineffective for failing to object to the prosecutor's comments.

Niksich also argues that counsel was ineffective for failing to object to several of the prosecutor's closing comments, which Niksich claims constituted misrepresentations of witnesses' testimony. As we do not have the entire trial transcript, it is difficult to tell whether the statements to which Niksich refers actually do misrepresent witnesses' testimony. Regardless, Niksich has failed to show any prejudice resulting from counsel's failure to object to these statements. Cf. Downing v. State, 178 Ind. App. 144, 152, 381 N.E.2d 554, 559-60 (1978) ("A misstatement of the evidence by the prosecutor during closing argument warrants reversal only when the defendant establishes a clear showing of prejudice.").

Niksich first claims that the prosecutor misstated the testimony of Superits, by saying that Superits indicated that Roche told him that Niksich was in the basement when Roche fired the shots. Even if Superits did not so state, at least three other witnesses placed Niksich in the basement at the time of the shooting. See Roche, 596 N.E.2d 897-89 (describing testimony of three witnesses that places Niksich in the basement). Therefore, Niksich cannot establish that counsel's failure to object to the prosecutor's characterization of Superits's

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[4] As we were not provided with the entire trial transcript, we do not know precisely what the defense said.

testimony resulted in prejudice.

Niksich next claims that the prosecutor misstated the testimony of Virginia Ratazczak when he stated during closing that "Ratazczak testified that [Roche] told her that if the Mexican testifies he will kill him." Appellant's Br. at 32. Niksich claims that Ratazczak's testimony does not contain this statement. As Niksich did not provide us with the portion of the transcript containing Ratazczak's testimony, we are unable to determine whether the prosecutor actually did misstate Ratazczak's testimony. Regardless, Niksich has wholly failed to articulate how this mischaracterization resulted in prejudice. He argues that this testimony made Sanchez a more credible witness, as it shows that Roche did not want Sanchez to testify. Any tendency this alleged mischaracterization had to bolster Sanchez's testimony can hardly be said to rise to the level of prejudicial error.

Niksich has failed to meet his burden of establishing that counsel's failure to object to the prosecutor's comments prejudiced him. Counsel's failure to object did not render his assistance ineffective.

3. Investigation of Alibi Defense

Next, Niksich argues that counsel was ineffective for failing to investigate a possible alibi. Trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 690-91. We give a great deal of deference to counsel's judgments regarding the extent and scope of

[5] Citations to the Transcript refer to the transcript from the hearing on Niksich's petition for PCR.

investigation. Parish v. State, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005). Niksich's counsel testified that Niksich had at one time informed him that he was not present during the shooting, but another time had indicated that he may have been present. He also testified that he spoke to two potential alibi witnesses who placed Niksich at different places during the time of the shooting. Counsel then stated that his decision to not further pursue an alibi defense rested on his determination that the information he was receiving regarding an alibi "was not credible enough to follow through or to follow up upon." Tr. at 9. Counsel provided a legitimate reason for his decision to not investigate an alibi defense, and Niksich has failed to demonstrate that his counsel's decision was not reasonable.

4. Jury Instruction Number 4

Niksich next argues that counsel was ineffective for failing to object to jury instruction number 4, which instructed the jury on the elements of voluntary manslaughter. This instruction also indicated that it applied only to Roche. Initially, we note that the trial court enjoys considerable discretion in instructing the jury, and improper instructions do not warrant a reversal unless "the instructions as a whole mislead the jury as to the law in the case." Shanabarger v. State, 846 N.E.2d 702, 710 (Ind. Ct. App. 2006), trans. denied.

Voluntary manslaughter is distinguished from murder in that it includes a "sudden heat" element, which, if present, allows a murder charge to be reduced to one for voluntary manslaughter. Dearman v. State, 743 N.E.2d 757, 760 (Ind. 2001). A defendant may be entitled to an instruction on voluntary manslaughter "if there exists evidence of sufficient provocation to induce passion that renders a reasonable person incapable of cool reflection."

Id. Niksich has not pointed to any evidence introduced at trial that he acted under sudden heat. Without such evidence, a trial court would properly have refused to give an instruction on voluntary manslaughter pertaining to him. See Morgan v. State, 759 N.E.2d 257, 264 (Ind. Ct. App. 2001). Niksich argues that instructing the jury on voluntary manslaughter regarding Roche, but not him, unconstitutionally punished him for failing to testify. We disagree.

"Although the State has the burden of negating the existence of sudden heat beyond a reasonable doubt, in order to inject that issue at all the defendant must point to some evidence supporting sudden heat whether this evidence be in the State's case or the defendant's own." Jackson v. State, 709 N.E.2d 326, 328 (Ind. 1999). Therefore, were Niksich able to point to any evidence at all introduced at trial that injected the possibility that Niksich acted under sudden heat, he would have been entitled to an instruction. However, Niksich has failed to point to any such evidence. Indeed, Niksich's primary defense at trial was that he had no prior knowledge of the crimes, and merely assisted in transporting the bodies. See Appellant's Br. at 22. Therefore, an instruction on voluntary manslaughter would have conflicted with his theory of defense, and it was reasonable for his counsel to not request an instruction on voluntary manslaughter. See Morgan v. State, 755 N.E.2d 1070, 1076 (Ind. 2001) (recognizing that it is a reasonable strategic decision to not request an instruction on voluntary manslaughter when the defendant testified that he acted in self-defense with no intent to kill). As Niksich has failed to present evidence that he would have been entitled to an instruction on voluntary manslaughter, he has not met his burden of demonstrating that his

counsel was ineffective for failing to object to his exclusion from the instruction.

Niksich also argues that this instruction "in essence told the jury that [Roche] could be found guilty of the reduced crime of voluntary manslaughter and directed the jury that [Niksich] could be found guilty of murder only, allowing them to perceive [Roche] had a lesser culpability in the crimes charged." Appellant's Br. at 27. However, the jury actually found Niksich to be less culpable than Roche, as it recommended that Roche receive the death penalty, and recommended that Niksich not receive the death penalty. Therefore, Niksich cannot demonstrate prejudice relating to the jury's perception of his culpability as compared to Roche's. We conclude that counsel was not ineffective for failing to object to jury instruction number 4.

5. Jury Instructions Regarding Elements of Crimes

Niksich argues that his trial counsel was ineffective due to his failure to ensure that the trial court informed the jury of every essential element that the State needed to prove in order to find Niksich guilty.

With regard to the jury instructions regarding murder in perpetration of a robbery, Niksich cannot meet Strickland's prejudice prong. Any failure of these instructions to cover the essential elements did not prejudice Niksich, as the trial court did not enter judgment of conviction on these counts.

With regard to the jury instructions regarding murder, we were not provided with the portion of the transcript in which the trial court instructed the jury, and Niksich's appendix does not contain copies of the final instructions. By failing to provide us with the trial

court's instructions, which he now claims were constitutionally infirm, Niksich has failed to meet his burden in demonstrating that his counsel was ineffective for failing to object to the instruction.

Even if we accept as true the instruction presented by Niksich in his brief, we still conclude that counsel was not ineffective for failing to object. In his brief, Niksich claims the trial court's instruction contained the statutory definition of murder, as well as the statutory definition of knowingly and intentionally. The statutory definition of murder indicates that "a person who . . . knowingly or intentionally kills another human being . . . commits murder." Ind. Code § 35-42-1-1. Niksich argues that informing the jury of this definition, along with the definitions of knowingly and intentionally, "does not tell the jury that the State was required to prove that Niksich 1) knowing or intentionally, 2) killed, 3) Earnest Graves or, 4) Danial Brown [sic]." Appellant's Br. at 41. As support for his argument, Niksich cites Sandstrom v. Montana, 442 U.S. 510 (1979), and Martinez v. Borg, 937 F.2d 422 (9th Cir. 1991). Both are clearly distinguishable. In Sandstrom, the Supreme Court held that the instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," impermissibly relieved the State of proving the defendant's intent beyond a reasonable doubt. 442 U.S. at 524. In Martinez, the trial court's instruction failed to inform the jury that in order to be convicted under a theory of aiding and abetting, the defendant must have the specific intent to aid the principal. 937 F.2d at 423. We fail to see how these cases support Niksich's argument, as the trial court's instruction neither omitted an element of murder nor relieved the State of establishing any of the

elements beyond a reasonable doubt. Niksich's trial counsel was not ineffective for failing to object to a permissible instruction.

6. Implied Conflict in Lake County Public Defender's Office

Niksich finally argues that his trial counsel was ineffective due to a conflict in the Lake County Public Defender's Office.

To the extent that Niksich argues that systemic problems in the Lake County Public Defender's Office at the time of his trial should amount to a presumption of ineffective assistance, our supreme court has rejected the claim that the situation in Lake County gives rise to such a presumption. Rondon v. State, 711 N.E.2d 506, 522-23 (Ind. 1999) (recognizing that although a study conducted by the Spangenberg Group "points to many areas which should be improved upon within the Lake County system, it does not reveal that the system is so unfair that it necessarily amounts to a presumption of ineffective assistance of counsel.").

Niksich also argues that the structure of the system at the time of his trial resulted in an implied conflict of interest, as both he and co-defendant Roche were represented by members of the Lake County Public Defender's Office. In support, Niksich cites Indiana Rules of Professional Conduct 1.7, which indicates "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," and 1.10, which indicates "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [Rule 1.7]." For purposes of the rules, a conflict of interest exists when:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clinets will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Id.

Niksich's claim fails as he has not demonstrated that a conflict of interest existed between him and Roche. The defenses put forth by Roche and Niksich did not conflict, and their interests did not conflict in any material manner. In fact, the interests of Roche and Niksich were substantially similar, as Roche's self-defense claim could serve only to have helped Niksich's defense. See infra, Part III.C.1. Because we conclude that no conflict of interest existed between Roche and Niksich, it was not improper for two attorneys working for the Public Defender's Office to represent them.[6]

Niksich has failed to raise any claim that has undermined our confidence in the outcome of his trial. The post-conviction court properly denied Niksich's claim of ineffective assistance of trial counsel.

C. Ineffective Assistance of Appellate Counsel

Niksich argues that his appellate counsel was ineffective for the following reasons:

1) for failing to argue that the evidence against Niksich was obtained illegally;
2) for failing to argue that the trial court abused its discretion in denying Niksich's motion for severance;

[6] We therefore need not address the issue of whether the Lake County Public Defender's Office constituted a "law firm" at the time of Niksich's trial.

3) for failing to argue prosecutor misconduct;
4) for failing to argue that Niksich was denied a fair trial when the trial court read jury instruction number 4;
5) for failing to argue that Niksich was improperly denied statutory good-time credit;
6) for failing to argue that the trial court improperly instructed the jury on the elements of murder in perpetration of a robbery;
7) for failing "to obtain, compile, and file an adequate record of review on appeal";
8) for failing "to reconstruct conferences held between the parties and the judge";
9) for failing "to request that exhibits[,] [w]hich because of their nature could not be incorporated in the transcripts[,] be photographed . . . and included in the record of proceedings"; and
10) for failing "to support claims made in the Appellant's brief with appropriate State and Federal Constitutional Authority."

Appellant's Br. at 28-29.

With regard to issues 1, 3, 4, and 6, for the same reasons we determined that Niksich has failed to demonstrate his trial counsel was ineffective for failing to raise these arguments, we conclude that Niksich has failed to carry his burden of demonstrating that his appellate counsel was ineffective for failing to raise these arguments. That is, Niksich has failed to show that proper objections at trial would have been sustained, or that had trial counsel argued in the manner suggested by Niksich, the result of his trial would have been different. Therefore, Niksich cannot show that the result of his appeal would have been different had

his appellate counsel argued these issues.

With regard to issues 7 through 10, Niksich has provided absolutely no argument or citation to authority to substantiate these claims. He has not set out a factual background from which we can determine his attorney's actions with regard to these issues, and has provided no legal support for how any alleged action or inaction constitutes ineffective assistance. Also, he has not demonstrated how any of these alleged deficiencies resulted in prejudice. We conclude that Niksich has failed to carry his burden with respect to these issues. We will address his remaining claims in turn.

1. Motion for Severance

Niksich's trial counsel filed a motion for severance, and twice orally moved that Niksich be tried separately from Roche. The trial court denied all these motions. Niksich argues that his appellate counsel was ineffective for failing to argue that the trial court improperly denied these motions.

Defendants may be tried together when they are charged with the same offense. Ind. Code § 35-34-1-9. Our supreme court has set out the applicable principles relating to the joinder of defendants:

> Several defendants may be joined in a single prosecution. However, upon a motion by defendant, the trial court may order a separate trial whenever the court determines that a separate trial is necessary to protect a defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of a defendant. The trial court has discretion to grant or deny a motion for separate trials. However, a trial court must grant severance of trials where there are mutually antagonistic defenses and the acceptance of one defense precludes the acquittal of the other. Upon review, the trial court's decision is measured by what actually occurred at trial rather than what is alleged in the motion.

Lee v. State, 684 N.E.2d 1143, 1147 (Ind. 1997) (citations omitted). In assessing what occurred at trial, we remember that "there is not a constitutional right to be protected from damaging evidence." Id. (quoting Castro v. State, 580 N.E.2d 232, 235 (Ind. 1991)). Finally, in order to succeed on a claim challenging a trial court's denial of a motion for severance, a defendant must show actual prejudice. Id. at 1148.

Niksich argues that his defense was in conflict with Roche's, as Roche claimed that he killed the victims in self-defense, while Niksich claimed that he had no prior knowledge of the crimes. Niksich fails to explain, and we fail to see, how these defenses are mutually antagonistic. Indeed, if the jury accepted Roche's argument that he acted in self-defense, responding to the victims' acts of aggression, it is hard to see how Niksich could have had prior knowledge that Roche was planning on murdering the victims. Therefore, it seems that if the jury had accepted Roche's version of events, Niksich's defense would have been aided. Roche and Niksich's defenses were not mutually antagonistic, and Niksich's appellate counsel was not ineffective for failing to so argue on direct appeal.

Niksich also claims that he was prejudiced by a joint trial because "[n]umerous pieces of evidence which would have been inadmissible against [Niksich] in a separate trial were spread before the jury prejudicing [Niksich] in the eyes of the jury." Appellant's Br. at 22. Specifically, Niksich argues that the following evidence would have been inadmissible in a separate trial: 1) Sanchez's testimony that Roche told him Roche had shot a victim repeatedly in the head; 2) Superits's testimony that Roche had showed him the newspaper clipping and

told him that Roche had committed the crime with a friend;[7] 3) Duszynski's testimony regarding conversations with Roche. We will examine each in turn. In addressing the testimony to which Niksich points, we reiterate that our review is somewhat restrained as we do not have the entire trial transcript before us, and have only the pages that Niksich has provided in his appendix.

Niksich points to Sanchez's testimony regarding Roche saying he "had shot one of the victims repeatedly in the head with a rifle that he got from upstairs." Appellant's Br. at 22. We have been unable to locate this testimony in Niksich's appendix.[8] Even if Sanchez did so testify, we find no prejudice resulting for Niksich. As discussed above, Niksich's defense was that he had no knowledge of the crime. A statement that Roche was the perpetrator can hardly be said to have prejudiced Niksich's defense of no prior knowledge.

Niksich next points to Superits's testimony relating conversations between him and Roche, and argues that because Niksich was not a party to these conversations, Superits's testimony regarding these conversations would have been inadmissible in a separate trial. Having reviewed the portion of Superits's testimony provided in Niksich's appendix, we find no testimony that prejudices Niksich. Niksich claims that Superits testified that Roche told him that he committed the crime with "a friend," but we have been unable to locate this testimony. See, n.8, supra. Moreover, even if Superits did so testify, we conclude that this

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[7] Niksich also argues that the newspaper clipping itself would not have been admissible in a separate trial. However, he has made no argument on this point, and we fail to see why the clipping would have been inadmissible.

vague comment that did not specifically identify Niksich would not have prejudiced Niksich in light of the other significant and admissible evidence implicating him in the murders.

Niksich next points to Duszynski's testimony that, when looking at the newspaper article, Roche "[j]ust said . . . there was no suspect, and you know, they was more or less free." Appellant's App. at 542. Niksich apparently is arguing that the jury would have inferred that the "they" referred to Roche and Niksich. However, at the time Roche made this statement, he was in a room with Duszynski and Roche's father, who was also implicated in the murders,[9] and the "they" would more rationally be seen as referring to Roche, Roche's father, and Duszynski, who was also in the house at the time of the murder. Niksich also points to Duszynski's testimony that Roche said after the shooting, "all they had was nineteen dollars and a dime bag worth of cocaine." Id. at 526. Niksich has made no argument as to how the statement relating to the nineteen dollars and cocaine caused him any prejudice. Finally, the impact of the testimony regarding Roche's comments is clearly minimal, as other parts of Duszynski's testimony indicate that she actually observed Niksich in the house at the time of the shootings. See id. ("They were coming up the stairs and it was [Roche, Roche's father], and [Niksich] was in between the dining room and the bedroom.").

Regardless of whether some of the evidence admitted at trial would have been inadmissible in a separate trial, Niksich has not pointed to any testimony that resulted in

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[8] At many points, Niksich cites to the trial transcript, which was not provided to us. Although we were able to locate many of the passages cited by Niksich in his appendix, some of these pages were not included in the appendix, and are therefore unavailable for our review.

prejudice. Also, as we grant trial courts considerable discretion when ruling on motions for severance, we cannot say that the trial court abused its discretion in denying Niksich's motion. Therefore, Niksich cannot demonstrate any prejudice resulting from his appellate counsel's failure to raise the argument on appeal.

2. Good-Credit Time

Niksich states that when he was sentenced on November 30, 1990, he had been incarcerated since May 14th, 1990, a period of 201 days. He further claims that during this period, he was assigned to credit class 1, and was therefore entitled to one day of credit for each day served. He argues that therefore, the trial court should have allotted him 402 days of jail credit time at sentencing, instead of the 201 he claims it did.

"A person assigned to Class I earns one (1) day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing." Ind. Code § 35-50-6-3(a). "A person . . . imprisoned awaiting trial or sentencing is initially assigned to Class I." Ind. Code § 35-50-6-4(a). However, that person may be reassigned to Class I or Class II if he violates a rule of the department of correction or penal facility in which he is imprisoned. Ind. Code § 35-50-6-4(b). People assigned to Class II earn one day of credit time for every two days imprisoned, and people assigned to Class III earn no credit time. Ind. Code § 35-50-6-3(b), (c).

If Niksich was indeed imprisoned from May 14 to November 30, assigned to Class I for this entire time, and awarded only 201 days of jail credit time, we would have a duty to

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[9] Roche's father was not tried with Roche and Niksich.

correct that mistake. See Senn v. State, 766 N.E.2d 1190, 1195 (Ind. Ct. App. 2002). However, we have before us no evidence to support Niksich's version of facts in his brief, in which he makes no citation to any supporting document. In the interest of justice, we perused the entire transcript, but still found no relevant documents except an "Arrest Report," which indicates that Niksich was indeed arrested on May 14. However, we have nothing before us indicating that Niksich remained in jail until his sentencing, nothing before us indicating whether Niksich violated any rules resulting in his reassignment to a different Class, and nothing before us indicating that the trial court awarded Niksich only 201 days of credit. In sum, Niksich has failed to present a record from which we can determine that the trial court erroneously failed to award Niksich credit. If Niksich has indeed unjustly been denied credit time that he has earned, we leave it to the appropriate correctional facility to recognize and correct this error.

Conclusion

We conclude that Niksich has waived all direct review of the errors he claims occurred at his trial. We further conclude that Niksich did not receive ineffective assistance of trial or appellate counsel. The denial of post-conviction relief is affirmed.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.